United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT LOW INCOME ADVOCACY COUNCIL, INC.,

Plaintiff-Appellants

vs.

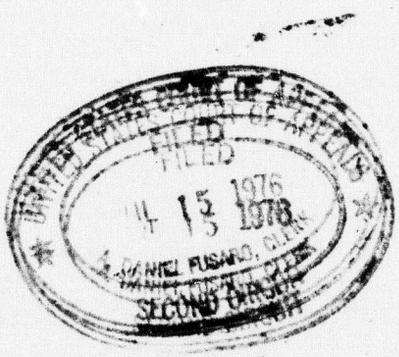
JOHN DUNLOP, In his official capacity as Secretary, United States Department of Labor,

Defendant-Appellee

On Appeal from the United States District Court

for the District of Vermont

BRIEF OF PLAINTIFF-APPELLANTS



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Did The District Court Err In Ruling, As A Matter Of Law, That Plaintiff Had Not "Substantially Prevailed" In This Action Within The Meaning And Intent Of The FOIA Counsel Fees Provision, 5 U.S.C. § 552(a)(4)(E)?

II. STATEMENT OF THE CASE

This is an appeal from the district court's denial of plaintiff Vermont Low Income Advocacy Council's [VLIAC] Motion For An Award Of Counsel Fees And Costs in litigation under the Freedom of Information Act [hereinafter FOIA]. 5 U.S.C. § 552. The unreported Memorandum and Order of the Honorable James S. Holden, Chief Judge appears in the Appendix at A-89 [hereinafter App.]. The proceedings below were as follows:

On August 28, 1975 VLIAC requested disclosure of certain Department of Labor records relating to recruitment of local labor for the autumn apple harvest. App. at A-21. VLIAC had been active in attempts during 1974 and 1975 to persuade the Department of Labor that certification of foreign labor to pick the Vermont apple crop was unnecessary, and deprived local workers of sorely needed job opportunities. App. at A-3. Its FOIA request was denied by letter dated September 8, 1975 on the ground that the material requested was exempt "intra-agency memoranda within 5 U.S.C. § 552(b)(5).

App. at A-22. Although required to by statute[1] and Department of Labor regulations,[2] the denial did not specify how the exemption applied to the requested records. Id.

In accordance with departmental regulations,[2a] VLIAC appealed the denial of its request to the Solicitor by letter dated September 16, 1975. App. at A-23. Receipt of the appeal on September 24, 1975 was acknowledged by letter of October 2, 1975.[3] App. at A-25. The letter of acknowledgement promised a determination of the appeal by October 22, 1975. Id.

Since VLIAC had not yet received a determination on its administrative appeal, counsel wrote the Solicitor on October 30, 1975, advising that suit would be filed unless the records were received by November 5. App. at A-26. The department responded by telegram dated November 6, 1975, stating that the file had not been located, and requesting counsel's telephone number. App. at A-63. Between November 6 and December 16, 1975, when the Solicitor's Office telephoned VLIAC's counsel to state that the documents would be released, appellant received no further communication from the department on the subject of its request.

1/ See 5 U.S.C. § 552(a)(6)(A)(i).

2/ 29 C.F.R. § 70.49.

2a/ 29 C.F.R. § 70.50 et seq.

3/ Plaintiff sent the appeal certified mail, return receipt requested. The return receipt (App. post 24) indicates delivery on September 19. There has been no explanation of the five-day delay.

The statutory time provided for a determination of VLIAC's administrative appeal had expired on October 22, 1975.[4/] On November 12, 1975, VLIAC filed suit. App. at A-2. Plaintiff mailed its motion for summary judgment to the district court on December 16, 1975, App. at A-16, and it was filed simultaneously with Defendant's Answer, on December 17, App. at A-2.[5/] On or about December 16, VLIAC was notified by telephone that the records would be furnished. App. at A-53.

VLIAC received virtually all the requested records on or about December 30, 1975. App. at A-71. Thereupon, it withdrew its motion for summary judgment and submitted a motion for an award of counsel fees and costs pursuant to 5 U.S.C. § 552 (a)(4)(E). App. at A-68, A-33. After argument, App. at A-69 et seq., the district court rendered a decision denying plaintiff's motion which held, in relevant portion:

> The assessment of counsel fees and costs under 5 U.S.C. § 552(a)(4)(E) is available in the court's discretion to a complainant who has "substantially prevailed." In differing contexts a prevailing party is generally held to be "the party in whose favor judgment is rendered... ." Mobile Power Enterprises, Inc. v. Power-Vac, Inc., 496 F.2d 1311, 1312 (10th Cir., 1974). And an election to favorably settle an action does not transform a compromising litigant into a prevailing party. Id. To hold otherwise would tend to discourage voluntary compliance after judicial review is undertaken. Such a course would work against the policy of the Act.

4/ 5 U.S.C. § 552(a)(6)(A)(ii). Administrative remedies were thereupon deemed exhausted. 5 U.S.C. § 552(a)(6)(C).

5/ The Answer did not plead any of the exemptions provided by FOIA, 5 U.S.C. § 552(b)(1)-(9), which are the sole defenses to compelled disclosure under the Act. App. at A-29, A-31. 5 U.S.C. §§ 552(a)(4)(B), 552(c).

> Here the plaintiff asserted its complaint in proper administrative proceedings. In the first instance the information was withheld on what may have been an erroneous interpretation of the recent statute. On appeal the administrative decision was delayed until the correct requested material could be retrieved from the Regional Office. While the delay generated the present litigation, as soon as the defendant discovered the plaintiff was lawfully entitled to part of the records, the appropriate material was supplied. Certain material was withheld, apparently with some legal justification. In any event, there is nothing this court has done to grant the plaintiff the relief prayed for in the complaint. There has been no judicial action to establish the plaintiff as the prevailing party.

App. at A-93, A-94.

III. ARGUMENT

A. Litigants Need Not Secure Judicial Action In Order To "Prevail" For Purposes Of An Award Of Attorneys Fees And Costs.

In finally obtaining virtually all the agency records it had requested nearly four months earlier, VLIAC undeniably was successful in securing the result sought by its action. Where litigation secures such a favorable result in areas of strong Congressional concern, the absence of judicial action does not bar an award of fees and costs under an appropriate statute or judicial rule.[5a/] As one court remarked in

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5a/ In this regard, the cases cited by the court below are wholly inapposite. Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311 (10th Cir., 1974), was a diversity action on an equipment lease which two of the parties settled. The co-defendant, against whom the action was dismissed with prejudice as part of the settlement, claimed the status of a "prevailing party." In that context, the court regarded the absence of a judgment in the co-defendant's favor as dispositive. And, in Mello

considering an award of fees in litigation under the Labor-Management Reporting And Disclosure Act:[6/]

> As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of fees to be allowed, and not to the issue of whether they should be awarded at all.

Yablonski v. United Mine Workers, 466 F.2d 424, 431 (D.C. Cir., 1972), cert. denied, 412 U.S. 918 (1973).[7/]

Thus, in Kerr v. Screen Extras Guild, 466 F.2d 1267 (9th Cir., 1972), a union member brought suit under the LMRDA challenging his union's attempts to discipline him. At a preliminary injunction hearing, the Guild's counsel assured the court that the disciplinary action had been abandoned; no injunction issued. The district court dismissed the action as moot and denied any fee award. In spite of the lack of judicial action establishing the plaintiff as a prevailing party, the court of appeals reversed, stating in pertinent part:

5a (continued)
v. Secretary of H.E.W., 8 E.P.D. ¶ 9620 (D.C.D.C., Aug. 15, 1974), the plaintiff not only had succeeded in the remanded administrative proceeding before amending her complaint and seeking summary judgment, but also had voluntarily resigned from government service before disposition of the motion.

6/ 29 U.S.C. §§ 412, 413(c), 501(b).

7/ See also, McDonald v. Oliver, 525 F.2d 1217 (5th Cir., 1976).

> On remand the district court will exercise its discretion and determine whether Kerr is entitled to recover his litigation expenses. In so doing, the court should take into account the fact that it was only after this action was brought that the defendant decided to stop the conduct complained of. In that sense, the action was effective in procuring relief, even though no injunction issued.

466 F.2d at 1271 (emphasis supplied.)

Similarly, where the plaintiff's action provided a "catalyst" to voluntary action by an opposing party, he was not required to secure relief by way of a judgment to be considered a prevailing party for purposes of a fee award. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir., 1970). See also, Evans v. Sheraton Park Hotel, 503 F.2d 177, 189 (D.C. Cir., 1974). Moreover, an award of costs was appropriate where plaintiffs' efforts in the litigation produced a settlement "inducing a more intense degree of introspection [concerning the environment] in the government agencies involved... ." Harrisburg Coalition v. Volpe, 381 F.Supp. 893 (M.D. Pa., 1974)(construing 28 U.S.C. § 2412).[8/]

Even absent statutory provision, mootness caused by a defendant's consession will not bar a fee award if the suit was "meritorious" and the plaintiff's effort caused others to benefit. Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), cert. denied, 398 U.S. 950 (1970)(securities litigation).[9/] The court

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8/ Cf. Jordan v. Fusari, 496 F.2d 646 (2d Cir., 1974)(§ 1983 action settled; assuming that plaintiff "prevailed.")

9/ See also, Ramey v. The Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir., 1974).

may determine whether such a suit was "meritorious" by judging whether it could have survived a motion to dismiss. Id. at 67. Further, where a plaintiff has prosecuted such litigation "to the brink of success" before the defendant acts, the concession provides a sufficient basis for the inference that the action was in fact due to the plaintiff's efforts. Globus, Inc. v. Jaroff, 279 F.Supp. 807 (S.D.N.Y., 1968).[10/]

The interests of judicial economy are well served by this general rule. To inject the requirement that a case must be "fought to the last ditch" in order to secure a fee award would simply "promote intransigent litigation." Aspira, Inc. v. Board of Education, 65 F.R.D. 541, 543 (S.D.N.Y., 1975). See also, Parker v. Matthews, 44 U.S.L.W. 2496 (D.C.D.C., April 1, 1976). Contrary to the district court's view in the present case, an award of fees in circumstances where the court has not had to act would not "tend to discourage voluntary compliance after judicial review is undertaken;"[11/] it would encourage prompt settlement by the government in order to minimize liability for fees -- and, far more importantly, as discussed below, it would help greatly to effectuate Congress' intent to encourage

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10/ See also, Gilson v. Chock Full O'Nuts, 331 F.2d 107 (2d Cir., 1964) (en banc). The rationale of these cases has been taken a step further, to permit a fee award even where suit was never commenced owing to the investigative and persuasive talents of counsel. See Blau v. Fayette-Faberge, Inc., 389 F.2d 469 (2d Cir., 1968).

11/ App. at A-93.

agency compliance with the FOIA without the necessity of citizen resort to the courts.[12/]

B. A Holding That The Government Can Avoid The Fees And Costs Of Litigation By Releasing Documents Before Entry Of A Judgment Would Undermine The Purposes Of The 1974 FOIA Amendments.

The intent of the Freedom of Information Act, as originally enacted in 1967, was to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[13/] The Act stripped federal agencies of the latitude they had enjoyed under former Section 3 of the Administrative Procedure Act of 1946, and subjected their decisions on disclosure of records to de novo court review. 5 U.S.C. § 552(a)(3)(1967). It also required agencies to make requested records promptly available to any person. 5 U.S.C. § 552(a)(3).

12/ See S. Rept. No. 93-854, 93d Cong., 2d Sess. (May 16, 1974), reproduced in Joint Committee Print, Freedom of Information Act And Amendments of 1974 (P.L. 93-502) -- Source Book: Legislative History, Texts And Other Documents, 94th Cong., 1st sess. at 169 (Mar., 1975)[hereinafter Joint Comm. Print]: "'If the government had to pay legal fees each time it lost a case ... it would be more careful to oppose those areas that it had a strong chance of winning.'" See also, 120 Cong. Rec. H 1798 (Mar. 4, 1974)(remarks of Congr. Alexander), in Joint Comm. Print at 263-64:

> Citizens are sometimes compelled to spend thousands of dollars - money they can ill afford - simply to assert rights which Congress is attempting to implement under both the spirit and letter of the Constitution.
>
> The Government has lost more than half of its Freedom of Information cases. That is not much of a track record. In fact, it is lousy. And guess who

Despite Congress' intention, agency opposition to the FOIA[14] led many to believe that it too had become a "freedom from information" law.[15] Primary among the problems raised were substantial bureaucratic delays in responding to information requests,[16] and the inconvenience and expense caused when citizens were relegated to court processes to challenge their government's denial of information.[17] This latter concern led the House Government Operations Committee to conclude, inter alia, that "the investment of many thousands of dollars in attorneys fees and court costs ... makes litigation under the act less than feasible in many situations."[18]

The direct response of Congress to this problem was the enactment of Section 552(a)(4)(E) of the FOIA. As the Senate Report observed:

12/ (continued)

> is stuck with the tab? The unfortunate citizen complainant and the taxpayers.
>
> The committee feels that once the Government has to take full responsibility for litigating indefensible cases, it will think twice before going to the mark in the first instance.

13/ S. Rept. No. 813, 89th Cong., 1st Sess. (1965).

14/ H. Rept. No. 92-1419, 92d Cong., 2d Sess. (Sept. 20, 1972), in Joint Comm. Print at 19-26, 29, 85-88.

15/ S. Rept. No. 93-854, supra, in Joint Comm. Print at 155.

16/ H. Rept. No. 92-1419, supra, in Joint Comm. Print at 15, 17, 19, 27, 29-35, 45-46, 90; S. Rept. No. 93-854, supra in Joint Comm. Print at 155, 175-80; H. Rept. No. 93-876, 93d Cong., 2d Sess., (Mar. 5, 1974), in Joint Comm. Print at 126.

Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning."

* * *

Congress has established in the FOIA a national policy of disclosure of government information, and the committee finds it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorneys' fees against the government where the plaintiff prevails in FOIA litigation.

* * *

The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fees to make the government comply with the law.19/

17/ See, e.g., H. Rept. 92-1419, supra, in Joint Comm. Print at 15, 45, 47, 80-83, 90; H. Rept. No. 93-876, supra, in Joint Comm. Print at 122, 126-27, 129; S. Rept. No. 93-854, supra, in Joint Comm. Print at 155, 169-172; Conf. (H.) Rept. No. 93-1380, 93d Cong., 2d Sess. (Sept. 25, 1974), in Joint Comm. Print at 226-27.

18/ H. Rept. No. 92-1419. supra, in Joint Comm. Print at 15.

19/ S. Rept. No. 93-854, supra, in Joint Comm. Print at 169-171.

Thus, Congress' intent in providing for statutory fees and costs clearly was to encourage and facilitate citizen litigation in vindication of the important national policy of disclosure of government information.[20/] To conclude that Congress did not also intend thereby to discourage agencies from unnecessarily forcing citizen-plaintiffs to go to court would be absurd. Yet, to deny fees and costs under Section 552(a)(4)(E) where the government supplies records after the commencement of litigation would require such a conclusion.

Those few courts which have considered the question have agreed that denial of the remedies provided in Section 552(a)(4)(E) in such circumstances would substantially undermine the legislative purpose. In Ruiz v. Bedell, Civ. Act. No. 75-0465 (D.C.D.C., filed Sept. 8, 1975)(unreported),[21/] for example, plaintiff challenged the International Trade Commission's regulation on computation of search fees under amended § 552 (a)(4)(A). Shortly after a stay of the proceedings was granted by the district court, the Commission promulgated final amended regulations on the subject, adopting "the substance of plaintiff's contention." Slip. Op. at 2. Although it dismissed the action as moot, the court awarded costs under Section 552(a)(4)(E) since the "lawsuit was an important factor in prompting the Commission to amend its regulations." Id. See also, Consumers Union v. Board of Governors, Civ. Act. No. 1766-73 (D.C.D.C.,

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20/ Id. at 170.

21/ Appellant has submitted to the Clerk a copy of all unreported decisions cited herein.

filed Oct. 24, 1975)(unreported.)[22/]

The courts also have made awards in cases in which the government conceded after the commencement of litigation by simply turning over all or substantial portions of the requested documents, just as it did here. In response to the government's contention that fees and costs could not be awarded in such a case, the court in Communist Party of the United States v. Department of Justice, Civ. Act. No. 75-1770 (D.C.D.C., filed Mar. 23, 1976)(unreported) said:

> The legislative history of section 552(a)(4)(E) indicates that Congress intended the awarding of attorney's fees and costs to enable private persons to pursue fully their right to obtain information under the Act's disclosure provisions and to deter the agency from asserting boilerplate claims of privilege in the hope that the financial burdens of litigation would deter aggressive challenge.
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> * * *
>
> If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. Thus, a general bar to awards of fees resolved before final judgment cannot be accepted by the court.

Slip. Op. at 3. (emphasis supplied.)

Similarly, in Kaye v. Burns, 75 Civ. 1873 (S.D.N.Y., April 5, 1976)(unreported), the United States Attorney provided plaintiff with a copy of the requested record some two months after the commencement of the action, following return of a grand

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22/ In Consumers Union, the plaintiff and defendant effectuated a settlement of all issues, which "would not have been achieved in the absence of the instant litigation." Slip. Op. at 2.

jury indictment involving a corporation which was the subject of the disputed record. The court observed that the plaintiff had "expended considerable time and effort to obtain the documents and records sought." Slip. Op. at 10. While it recognized that Congress intended the construction of Section 552(a)(4)(E) to be guided by case law developed under other federal statutory fee provisions, and that those provisions often had been found to limit awards to parties who succeeded in court,[23] it stated:

> It is inconceivable, however, that the recovery of attorneys' fees could be foreclosed whenever the government chooses to moot an action under the Freedom of Information Act by supplying, during the pendency of the litigation, the material sought in the complaint. ... To hold otherwise would be to inject an "absurd requirement" into the statute -- i.e., that a case necessarily proceed to final judgment before an award of attorneys' fees may be made.
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> * * *
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> Furthermore, the salutory purposes of the statute to encourage voluntary compliance with the FOIA, and to encourage suit where an agency has wrongfully withheld requested material could be too easily rendered nugatory if the government could force a party into litigation and then deprive that party of the right to recover expenses incident to bringing the action.

Slip. Op. at 13-14. The court concluded that the proper construction of the "substantially prevailed" requirement of § 552(a)(4)(E) "would not preclude the recovery of attorneys' fees and litigation costs where the government, after commencement of the litigation, has acted to moot the action by supplying the material sought."[24]

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[23] Slip. Op. at 12.

[24] Slip. Op. at 15. Upon its further analysis of the factors which Congress suggested should guide the exercise of the court's discretion in making a fee award, however, the court declined to do so. Slip. Op. at 16-22.

Precisely the same reasoning was employed by the court in Goldstein v. Levi, Civ. Act. No. 75-0993 (D.C.D.C., filed June 18, 1976)(unreported), where the plaintiff had been seeking the documents for nearly three years, and the F.B.I. forwarded copies about one and one-half months after the complaint was filed. Slip. Op. at 2,4-6. Although the government contended that the documents were released not as a result of the suit, but on a "policy decision" of the Attorney General, Slip. Op. at 3, the court did not find it difficult to make the necessary inference of causation in holding that the plaintiff had "substantially prevailed."[25/] See also, Emery v. Laise, Civ. Act. No. 76-516 (D.C.D.C., filed June 3, 1976(unreported).

Other important policy considerations buttress the conclusions reached by these courts. In asserting the strong presumption in favor of awards of fees in desegregation cases, the Supreme Court has noted that such suits are among those for which vindication of a national policy depends upon the action of private citizens pursuing their rights under the law. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400,402 (1968). That presumption is even more justified in FOIA cases. Unlike the civil rights statutes, in whose enforcement federal agencies assist, the Freedom of Information Act must be enforced, if at all, wholly by private citizens who are pitted against the Department of Justice and its large client agencies.

25/ In so doing, the court appears to have flatly rejected the reasoning employed by the district court in the instant case. Slip. Op. at 3, 5-6.

Furthermore, as the Supreme Court suggested in Hall v. Cole, 412 U.S. 1, 13 (1973), disparity in resources between the litigant and his opponent may provide a justification for fee-shifting. Whether or not a judgment has been secured, that disparity in resources is plainly appropriate for consideration in FOIA cases.[26/] Indeed, as the District of Columbia Circuit has said with regard to FOIA cases, because of the "usual disparity in the size of the parties it should be the policy of the Court to give the seeker of information whatever advantages are conferred on him by statute." Schwartz v. I.R.S., 511 F.2d 1303, 1307 (D.C. Cir., 1975). Certainly Section 552 (a)(4)(E) is one of the most precious of those advantages. FOIA litigants should not be deprived of its benefits whenever the government deems it appropriate to concede a case.

C. Appellant's Suit Resulted In Or Expedited The Release Of The Documents.

It is unclear whether the court below concluded that VLIAC's action had no impact upon the department's release of the documents in question since it appears to have regarded

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26/ See, S. Rept. No. 93-854, supra, in Joint Comm. Print at 171:

> Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.

the question of fees foreclosed absent judicial action.[27] If the court did so conclude, appellant contends that it proceeded to do so on an erroneous view of the law and in the complete absence of probative evidence.

The department's release of the documents just prior to the time for summary judgment raised the inference that, but for the pressures of suit, plaintiff would not have received them, or their receipt would have been further delayed. See Goldstein v. Levi, supra; Community Party of the United States v. Department of Justice, supra; Ruiz v. Bedell, supra. See also, Globus, Inc. v. Jaroff, supra. In either event, VLIAC's suit played a role in ensuring its receipt of records for which it was compelled to go to court, and furthered Congress' "national policy of disclosure." The department's submission to the district court was insufficient to rebut that inference, and it was clearly the department's burden to do so.[28]

The affidavit of the department's Counsel For Administrative Procedures does not state that VLIAC's suit had no impact on the decision to release the records.[29] Insofar as it implies that to be the case, such an assertion cannot suffice, since its acceptance would consistently bar awards of fees and discourage requesters of information from litigating aggressively. Moreover, in the context of this case, the suggestion flies in the face of the complete absence of

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27/ See App. at A-93 to A-94.

28/ See, 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(B), 552(a)(6)(C).

29/ App. at A-51-A-56.

communication from the department to VLIAC for a period of more than a month, during which time the agency enjoyed the opportunity to review records of the same nature which covered a different time period [30/] and, presumably, the opportunity to consult with the office which had mistakenly sent those records on whether they differed in character from the desired ones. After all, the government had not denied the existence of the specific records VLIAC sought. Finally, the department's admission that the "documents were erroneously withheld on the basis of exemption 5 of FOIA" [31/] renders unavailable to it any claim that its "withholding of the records ... had a reasonable basis in law." [32/]

30/ App. at A-53, ¶ g.

31/ App. at A-65. Contrary to the district court's view, this was not an "erroneous interpretation of the recent statute." Exemption Five had been part of the FOIA for nearly 10 years when the interpretation was made, and was unchanged by the 1974 Amendments. Compare 5 U.S.C. § 552(b)(5)(1967) with 5 U.S.C. § 552(b)(5)(1974). Moreover, the courts have frequently warned that exemption five was "not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum." Stokes v. Brennan, 476 F.2d 669, 703 (5th Cir., 1973).

32/ S. Rept. No. 93-854, supra, in Joint Comm. Print at 171. The fact that certain "minor deletions" were made on the basis of Exemption 6 ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy") would not alter this conclusion. See, 5 U.S.C. § 552(post)(b)(9). It is equally important to note in this connection that the government's Answer to the complaint pleaded none of the exemptions in Section 552(b)(1)-(9). App. at A-29-A-31.

In addition, the department's explanation of the delay which preceeded the filing of this action and its release of the documents fails legally and factually to prove that VLIAC's suit did not expedite the process. In reviewing the agency's difficulties, the affidavit merely reiterates objections which were voiced by agencies to the proposals for strict time limitations under FOIA, and rejected by Congress in its enactment of the 1974 Amendments.[33/] It is unacceptable as a matter of law to prove compliance unrelated to the suit. As the court stated in Communist Party of the United States v. Department of Justice, supra:

> FOIA contains a strict time schedule within which an agency is to act upon a request, or face the prospect of being taken to court. 5 U.S.C. § 552(a)(6). The agency is bound by this schedule just as it is bound by the Act's provisions mandating disclosure of nonexempt documents. Congress felt that these time provisions were sufficiently important to the overall legislative scheme to be written into the Act, and the court cannot write them for the FBI, or any other agency, regardless of the circumstances. If the FBI cannot comply with the statute's requirements, its remedy lies with Congress, not the Courts.

Slip. Op. at 4. To permit the agency cavalierly to ignore these mandatory requirements, and later to claim all possible expedition, would be to announce to requesters of information that they should not depend on the statute as written.[34/]

33/ 5 U.S.C. §§ 552(a)(6)(A)(i) and (ii), 552(a)(6)(B), (C). See also, H. Rept. No. 93-876, supra, in Joint Comm. Print at 135-144; S. Rept. No. 93-854, supra, in Joint Comm. Print at 178-186.

34/ In this connection, it must be remembered that Congress overwhelmingly overrode President Ford's veto of the FOIA amendments which was based specifically on objections to the time limitation provisions. Joint Comm. Print at 398-99, et seq.

In the instant case, VLIAC appealed the denial of its request on September 16, 1975 and the appeal was acknowledged received on September 24.[35/] The time limitation contained in Section 552(a)(6)(A)(ii) had run by October 22, 1975. Still, VLIAC afforded the department eight extra days before making a demand for the records, and waited twelve additional days before commencing the action. The government's presentation to the district court fails completely to explain why it failed to communicate with appellant between November 5 and December 16 save by a frantic telegram, why it failed to employ the provisions of 5 U.S.C. § 552(a)(6)(B) to secure an extension for "unusual circumstances" or, if it was completing its administrative process with all possible speed regardless of the lawsuit, why it did not seek an order from the district court under 5 U.S.C. § 552(a)(6)(C) staying the action until it could complete its review.[36/] The 1974 FOIA amendments also afford the government certain remedies; its failure to use them should not be visited upon an opposing litigant who seeks to utilize clear statutory procedures to expedite the receipt of public records to which a plain entitlement exists.

35/ But see, note 3, supra.

36/ Additionally, the affidavit reveals unreasonable time gaps in the administrative appeals process, into which no inquiry apparently was made. First, although the records were requested from the regional office on October 3 (App. at A-52, ¶ d), no inquiry regarding their whereabouts was made until appellant's threat to sue was received on November 5, more than a month later. Further, another month elapsed between the time the regional office sent the "wrong" records (App. at A-53, ¶ g) and December 11 when the Solicitor received the correct ones (App. at A-55, ¶ 4). This performance certainly does not demonstrate a substantial effort to comply with the strict time limitations of the Act.

IV. CONCLUSION

By securing agency records from the government after commencement of its action, VLIAC "substantially prevailed" within the language and intent of 5 U.S.C. § 552(a)(4)(E) To hold otherwise would undermine Congress' intent to encourage aggressive citizen litigation under FOIA and to discourage the government from forcing citizens to sue unnecessarily to secure agency records. Under the circumstances, the conclusion that the suit led to or expedited production of the records is inescapable.

As the district court recognized in part, and the record makes clear, VLIAC sought the records in furtherance of public interest goals, and derived no commercial benefit from the litigation.[37/] Moreover, in view of the department's concession that its claim of exemption was in error, it is plain that the government's withholding had no reasonable basis in law. Having met the appropriate criteria, VLIAC was entitled to an award under Section 552(a)(4)(E).[38/] Therefore, it respectfully requests this court to reverse the order of the district court, and to remand with instructions to enter an order awarding fees and costs, including those incurred on this appeal (upon submission of a proper application).

37/ See App. at A-89, A-3, A-21, A-36, A-38-A-39.

38/ S. Rept. No. 93-854, supra, in Joint Comm. Print at 171-72; Conf. (H.) Rept. No. 93-1380, supra, in Joint Comm. Print at 226-27.

Dated at Burlington, Vermont, this 14th day of July, 1976.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was mailed, postage prepaid, this 14th day of July, 1976, to George W. F. Cook, United States Attorney, District of Vermont, Federal Building, Rutland, Vermont 05701.

Michael H Lipson

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SUPPLEMENT TO APPELLANT'S BRIEF

THE FREEDOM OF INFORMATION ACT AS AMENDED IN 1974 BY PUBLIC LAW 93-502

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt

of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or postions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the indentity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.